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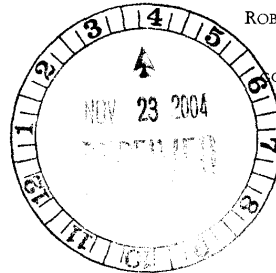
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November 23, 2004



Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

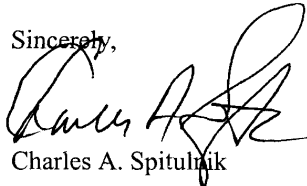
**Re: Forty Plus Foundation/Manhattan Central Railway Systems, LLC - - Feeder
Line Application - - New York, NY, Finance Docket No. 34606**

Dear Sir:

I am enclosing an original and ten (10) copies of the Petition of the City of New York to Strike Notice of Intent and Dismiss This Proceeding in the above referenced case. Please date stamp the extra copy of this document and return to our messenger. In addition, we are enclosing a 3.5 inch diskette with this document.

Please let me know if you have any questions.

Sincerely,


Charles A. Spitulnik

ENTERED
Office of Proceedings

NOV 23 2004

Part of
Public Record

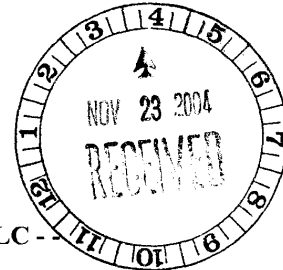
Enclosure

212610

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.

Finance Docket No. 34606

FORTY PLUS FOUNDATION/
MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC -
FEEDER LINE APPLICATION - -
NEW YORK, NY



ENTERED
Office of Proceedings

NOV 23 2004

PETITION OF THE CITY OF NEW YORK TO STRIKE
NOTICE OF INTENT AND DISMISS THIS PROCEEDING

Part of
Public Record

The City of New York ("the City") hereby moves this Board pursuant to 49 C.F.R. §1117.1 to reject the "Notice of Intent to File Feeder Railroad Development Application" filed in this proceeding on October 26, 2004 by the Forty Plus Foundation, Inc. ("Forty Plus") and the Manhattan Central Railway Systems, LLC ("MCRS"). The putative Notice is a pleading that finds no home in this Board's regulations. Moreover, if it is instead the application for approval of a feeder line project, which the format of the document suggests that it might be, it is inadequate. To avoid allowing Forty Plus to create even a cloud of uncertainty as to the status of the track segment involved in Docket No. AB 167 (Sub-No. 1094A)¹, the City respectfully requests this Board to strike the Notice of Intent and dismiss this proceeding.

INTRODUCTION

As this Board is well aware, the *High Line Proceeding* has been on the docket for over 15 years. See *Chelsea Property Owners - Aban. - The Consol. R. Corp.*, 8 I.C.C. 2d 773, *aff'd sub nom. Consolidated R. Corp. v. I.C.C.*, 29 F.3d 706 (D.C. Cir. 1994). That proceeding is now at a stage according to the most recent pleading filed by the Chelsea Property Owners ("CPO"),

¹ *Chelsea Property Owners - Abandonment - Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* (the "*High Line Proceeding*").

where the City, the railroads, and CPO “have reached agreements on all substantive issues and are in the process of documenting them”, and where that documentation and the necessary filings to be submitted to this Board are all but complete. *High Line Proceeding*, Decision served November 1, 2004, *slip op.* at 1. While, to the best of the City’s knowledge, no party to those negotiations has had any discussions with Forty Plus, its pleading creates the impression (baseless, but nonetheless present) that there is a plan afoot that would supplant the transactions under discussion.

ARGUMENT

A. The Board’s Rules Do Not Contemplate Beginning a Feeder Line Proceeding With a Notice of Intent.

The Board’s regulations at 49 C.F.R. Part 1151 describe the procedure for beginning a “feeder line” application proceeding by which a line of railroad that is on the railroad’s system diagram map can be sold to a “financially responsible person”. An applicant commences a proceeding by filing an application, not a Notice of Intent. 49 C.F.R. §1151.2(a). An applicant that does not have sufficient information to file a complete application may file an incomplete one along with a discovery request that will lead to the production of information required to complete the document. 49 C.F.R. §1151.2(d)(1). An interested party cannot commence a proceeding by submitting a Notice of Intent. This purported Notice and this proceeding should be dismissed until Forty Plus complies with the Board’s requirements.

B. If the Document Filed On October 26 is an Application, it is Incomplete.

Forty Plus has filed a Notice of Intent in a format that suggests that it was preparing an application, but stopped short. The impression that this is an application is supported by the repeated references in the document to Forty Plus as “Applicant”. If in fact it is an application, it

is incomplete at best and should be rejected. If it is not an application, then as noted above, it similarly should be rejected.

An incomplete application is acceptable only if it is accompanied by a discovery request for information the applicant cannot provide itself. 49 C.F.R. §§1151.2(b)(2). Otherwise, the applicable regulations require the Board to reject an incomplete application no later than thirty (30) days after it is filed. 49 C.F.R. 1151.2(d)(1). This document cannot survive the initial inquiry into its completeness. Out of the forty-four pages of material submitted, two shortcomings stand out:

- (1) The regulations require a “description of applicant’s affiliation with any railroad.” 49 C.F.R. §1151.3(a)(2)(iii). Forty Plus lists as its co-applicant the Manhattan Central Railway Systems LLC, which is described “as a *Class III Shortline railroad* [that] is affiliated with **NY Cross Harbor Railroad, Inc. (“NYCH”).**” (emphasis in original). However, in a letter filed in this proceeding on October 28, 2004, NYCH promptly disavowed any connection with or endorsement of this “application.”
- (2) The regulations also require a showing that the “applicant” is a “financially responsible person.” 49 C.F.R. §1151.3(a)(3). Page 11 of the “Notice of Intent”, which contains the header “Financial Information About The Applicant”, is blank. The ensuing text discusses many issues but does not touch upon the financial standing of the “applicant” that has no railroad partner. There is much conjecture here about economics and feasibility and viability, but no showing that this crucial aspect of the Feeder Line regulations is satisfied.

These two are information deficits that cannot be solved by discovery requests to the owning railroad. The information required with respect to each is information that is wholly within the ability of the "applicant" to provide, not the owner. *See* 49 C.F.R. §1151.2(d)(1). As a result, an "application" that lacks this crucial information cannot be conditionally accepted pending the receipt of the information from the owning carrier. *See* 49 C.F.R. §1151.2(d)(2).

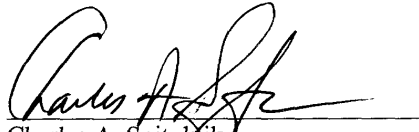
Without more - - much more - - this document cannot be viewed as including sufficient information to provide this Board with the ability to move forward with a proceeding. The Board should reject this document as an incomplete application.

CONCLUSION

Based on the submission filed by Forty Plus in this action, there is no basis for preserving this proceeding. The putative "Notice of Intent", until its contents are reviewed by a knowledgeable reader, could create an impression that there exists a potential that the line segment involved in the *High Line Proceeding* might be about to be sold. That impression, if allowed to persist, could create obstacles to the implementation of the transactions that the railroads, CPO, the City and the State - - the parties to the *High Line Proceeding* - - are close to completing. If this "application" were real, that is, if it had any of the elements required by the applicable statute and regulations, then such a cloud on the horizon might be appropriate - - unwelcome, but appropriate. This is not real. NYCH's very quick renunciation of any alleged affiliation immediately calls into question the veracity of the remainder of the document as well.

WHEREFORE, the City of New York respectfully requests this Board to strike the Notice of Intent and to dismiss this proceeding for a failure to follow the procedures required by the applicable regulations at 49 C.F.R. Part 1151, or, in the alternative, to reject the pleading filed as incomplete if it is an application.

Respectfully submitted,



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Counsel for the City of New York, NY

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2004, I served a copy of the foregoing PETITION OF THE CITY OF NEW YORK TO STRIKE NOTICE OF INTENT AND DISMISS THIS PROCEEDING by first class mail, postage prepaid, on:

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